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Supreme Court of the United States

OCTOBER TERM—1933

No. 506

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,

Petitioners,

—against—

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey corporation,

Respondent

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is submitted on behalf of owners of real property who have filed proofs of claim herein or in other bankruptcy proceedings, the ultimate disposition of which may depend upon the final decision in this case and the companion case of *Manhattan Properties, Inc.* v. *Irving Trust Co.* There is but one general question of law presented in both cases:

> Where a lease of real property provides that if the tenant is adjudicated bankrupt the landlord may reenter and the tenant shall indemnify the landlord against all losses of rent during the balance of the term, and where the landlord reenters within the six months period for filing claims, is the obligation of the tenant a provable debt?

This is solely a federal question, involving the construction of the Bankruptcy Act. No question of local law is

involved. The question is not whether under the local law the bankruptcy of the tenant constitutes a breach entitling the landlord to sue at law for damages resulting from the entire nonperformance of either the rent or the indemnity covenant if so, there would be a liability absolutely owing at the date of the petition, clearly provable. The question is whether, irrespective of local law, the indemnity agreement constitutes or supports "a debt, demand or claim provable in bankruptcy."

The question has never been decided by this Court. Until so decided, it will give rise to constant litigation, for neither the bar generally nor the federal courts in certain of the circuits will accept as final the doctrine of *Roth & Appel*, 181 Fed. 667. Many lawyers and legal writers share the view of Judge Learned Hand, expressed in the opinion in the *Manhattan Properties* case, that the decision in *Maynard v. Elliott*, 283 U. S. 273, has cut away the sole ground upon which *Roth & Appel* was supportable.*

The doctrine of the latter case has resulted in grave abuse, particularly in connection with chain store corporations which, although solvent in many cases, have resorted to voluntary bankruptcy as a vehicle for corporate reorganization. Resulting conditions, which have reached the proportions of a nation-wide scandal, have been recently summarized as follows:

> "The practical consequence of this rule [*i. e.* the doctrine of *Roth & Appel*] is that corporations whose assets greatly exceed their liabilities may file a petition in bankruptcy, and by the simple expedient of forming a new corporation to purchase the business of the bankrupt corporation, they are able to repudiate their leases. Certain it is that many large business organizations, some of them with chains of

* This view is ably presented by W. S. Schwabacher and S. C. Weinstein in their article "Rent Claims in Bankruptcy", 33 Col. L. Rev. 213, where the general subject is exhaustively briefed.

> stores throughout the United States, are filing voluntary petitions in bankruptcy primarily to avoid burdensome leases, and the landlords appear to be without remedy. Many others, by reason of this situation, are able by threat of bankruptcy, to procure from their landlords rent reductions to which they are not entitled. But one step removed from the landlords are the banks, building associations and insurance companies who have financed the leased premises and whose security is impaired by vacancies and consequent loss of income. So urgent has this problem become that the National Association of Credit Men has recently urged the arbitration of lease difficulties to avoid this abuse of the Bankruptcy Act."
>
> Effect of Bankruptcy Upon Leases of Real Property, by Elias Marks, 7 Univ. of Cinc. L. Rev. 162.

That the Court, if it grants the writs prayed for, should reverse the decisions below, is apparent upon grounds of logic, policy and fairness.

Every contractual promise creates a duty forthwith on the making of the contract (Restatement, Contracts, §250, *Comment c.*). Since it is no objection to the provability of a contractual obligation that it is conditional at the date of the petition (*Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549; *Maynard* v. *Elliott*), every contractual duty*, provided only that it is capable of valuation, logically should be provable—and that is the rule adopted by the American Law Institute (Restatement, Contracts, §324).

There is no objection to the provability of the claims that the doctrine of anticipatory breach has been said not to apply to agreements to pay money only or to leases of

* Of course, if the nature of the duty is such that the deprivation of the promisor's assets does not disable him from performing, *e. g.*, a personal service contract, there is no claim. Nor, if the trustee has the right to and does affirm.

real estate, for it is not necessary to apply the doctrine in order to allow such claims. It is true that the doctrine was made the subject of discussion in the *Chicago Auditorium* case (240 U. S. 581), but this discussion may have been due to the fact that at that time it was not clear that the contractual duty to be proved, although it must be in existence at the date of bankruptcy, need not then be absolute. That anticipatory breach was not later considered the real basis of the decision is shown by the citation of the case in the opinion in *Maynard* v. *Elliott*, in support of the provability of claims not absolutely owing at the date of the petition (p. 275 283 U. S.).

It has been said, however, that "the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke" (*Gardiner* v. *Butler*, 245 U. S. 603, 605). The court below construed the doctrine of *Roth & Appel* to require that the historical distinction attach "not only to realty itself, but to covenants which concern it or rents issuing from it." But the opinion in *Roth & Appel* referred to the historical "diversity" only so far as the claim before the court was considered to be a claim for rent as such, and this Court's reliance thereon in *Gardiner* v. *Butler* was expressly stated to have been "in the absence of statute or express contract". The section of Coke on Littleton (292b) respecting the "diversity", shows that at common law the duty to pay rent was conditional on occupation, but it throws no light on the question of provability in bankruptcy of a claim under a personal covenant which expressly survives eviction and was obviously intended by the parties to permit the landlord to prove a claim thereon in the event of the tenant's bankruptcy. If this type of conditional contractual duty is not provable, it is not because of the historical "diversity", but must be required by some consideration of policy or fairness.

The legislative policy embodied in the Act is one of prompt liquidation for the benefit of creditors and the relief of honest debtors. The allowance of such claims will not delay the administration of the estate, for in every case the indemnity agreement can be valued as soon as reentry is effected, which *ex hypothesi* occurs within the period for filing claims. We are not here concerned with the problem which arises where the event which gives the landlord the election to reenter does not occur within the period for filing claims or may not occur at all. This Court's citation, in its opinion in *Maynard* v. *Elliott*, of *Atkins* v. *Wilcox*, 105 Fed. 595, as a case involving a condition depending upon "an event so fortuitous as to make it uncertain whether liability will ever attach", may forecast the answer. *Atkins* v. *Wilcox* dealt with a claim for future rent (not indemnity) under a lease which contained a covenant giving the landlord the right to reenter in various events none of which had occurred, but the lease did not contain an indemnity covenant surviving reentry.

The argument may be made that if the condition of reentry must be resolved within the six months period for filing claims, then the landlord, by refraining from exercising such right until after the expiration of the period, may avoid the bar of the bankrupt's discharge and thus nullify a basic policy of the statute. But the same objection applies in the case of claims based on any executory contract of the bankrupt; for if the other party, by electing not to treat the bankruptcy as enabling him to file a claim for the entire loss of the contract, could preserve his rights under the contract against the bankrupt with respect to any subsequent breaches despite discharge, the policy of the Act would likewise be defeated. It is believed that in neither case has the creditor the power thus by his own action or non-action to control the provability of his claim. While the *allowability* of the

landlord's claim for the purpose of receiving dividends may depend on the exercise of the right of reentry and the taking of such other steps as may be necessary in order to liquidate the claim, yet none of these steps is essential to the *provability* of the claim; these conditions, being subject to the claimant's control, may be ignored (*Maynard* v. *Elliott*); in any event, the claim will be barred by the discharge.*

From the point of view of fairness, little need be said. The good will and earning power of many corporations now in bankruptcy, especially chain store organizations such as United Cigar Stores, were derived from the possession in more prosperous times of the very leases—covering premises located in strategic points in various cities—that have now been disaffirmed by the trustee in bankruptcy. It is hardly equitable that the other creditors should be in a position, through bankruptcy sales, to take over the enterprises as going concerns, leaving the former landlords to bear the entire economic loss resulting from present conditions.

It may be suggested that it is unfair to the other creditors to permit the landlords to prove, because the indemnity agreements were not considered as liabilities in the balance sheet or credit statements of the bankrupt prior to bankruptcy. But such statements do not usually disclose contractual obligations which have not been breached or liquidated. The same argument would exclude the proof of any contract for the purchase or sale of personal property still executory at the date of bankruptcy.

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* In the case of a bankrupt individual it might happen that after the trustee disaffirmed, both parties to the lease were willing that the relationship continue regardless of the bankruptcy; in such a case, a new promise by the tenant to perform the indemnity agreement would avoid the effect of his discharge (*Zavelo* v. *Reeves*, 227 U. S. 625).

The position in which the bankrupt tenant is placed if claims of this character are not provable in bankruptcy must not be overlooked. This is of the utmost importance to individual bankrupts conducting their business on leased premises. The claim for indemnity, if not provable, will frustrate the policy "to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh, free from the obligations and responsibilities consequent upon business misfortune." The bankrupt would have lost the use of the property because of the landlord's reentry, and yet would be still burdened by the landlord's claim arising out of the former lease, at the very time he would need freedom from such responsibilities in order to make a fresh start in business.

There can be no reasonable objection to the method of valuation discussed in the petitioners' brief. While for the purposes of judicial valuation the date of a divorced wife's remarriage will not be estimated (*Dunbar* v. *Dunbar*, 190 U. S. 340), the prophecy of economic factors is a commonplace (see opinion below in the *Manhattan Properties* case). There is no merit in the suggestion that since the leases involved in the instant cases do not specify this method of valuation, but provide for indemnity either at the end of the term or in instalments over the balance of the term, to award any present sum as indemnity would change the contract of the parties and give the landlord something for which he did not contract. When future performance is made the subject of judicial valuation the law never aims at an exact equivalent but is satisfied with fair approximation. This was done in the *Chicago Auditorium* case where neither the damages nor the method of computing them was contracted for. The contract in that case provided for a penalty—the bankrupt was to remain

liable for all payments in full after forfeiture—and yet a claim for indemnity on a fair computation was allowed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 505

MANHATTAN PROPERTIES, INC.,

Petitioner,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc.,

Respondent.

No. 506

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,

Petitioners,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey corporation,

Respondent.

Motion by Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America, to Advance and to Consolidate for Joint Hearing.

Consent by Petitioners and by Irving Trust Company, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc., to the Granting of said Motion, and Waiver of Notice thereof.

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October 27, 1933.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

MANHATTAN PROPERTIES, INC., *Petitioner,* *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc., *Respondent.*	No. 505
SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD, *Petitioners,* *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey corporation, *Respondent.*	No. 506

MOTION TO ADVANCE AND TO CONSOLIDATE FOR JOINT HEARING

To the Honorables, The Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

Comes now, Irving Trust Company, as respondent in No. 506, and respectfully moves the Court to advance the above-entitled causes for joint hearing on an early day convenient to the Court.

Both cases involve claims in bankruptcy for future rent. Irving Trust Company, as Trustee in Bankruptcy and respondent in both cases, has consented to the grant of petitions for writs of certiorari.

Although the two leases differ in language, the Circuit Court of Appeals in its opinions treated the two as governed by one broad rule of law, *i.e.*, the rule that claims upon covenants by the lessee to indemnify the lessor against loss of future rent are not provable claims in bankruptcy.

In the United Cigar Stores estate, the time for filing claims expired February 29, 1933. Landlords' claims for future rent were filed in respect of upwards of 300 different leases, the aggregate claims (exclusive of intercompany claims) amounting to more than $7,000,000.* Of these, over 40, involving in excess of $3,000,000, are now pending before the Referee and the lower Courts.

The same issue has arisen in a number of other estates which are in course of administration in the Southern District of New York, and in many of which the respondent is acting as Trustee in Bankruptcy.

The respondent is further advised that there are numerous other estates in course of administration in other district courts in which similar questions are pending.

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*It has been estimated, however, that there were upwards of 1000 of such leases upon which such claims (exclusive of intercompany claims) might have been filed, the aggregate future rent representing more than $50,000,000.

A final determination of the law on the question of landlords' rights to prove claims in bankruptcy for future rent would clarify the status of many such estates, and a final decision adverse to the claim of the landlords would permit many such estates now to be wound up by composition or sale.

WHEREFORE, respondent prays that the above-entitled causes be set down for joint hearing on an early day convenient to the Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

MANHATTAN PROPERTIES, INC., *Petitioner,* *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc., *Respondent.*	No. 505
SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD, *Petitioners,* *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey corporation, *Respondent.*	No. 506

CONSENT TO MOTION TO ADVANCE AND TO CONSOLIDATE FOR JOINT HEARING, AND WAIVER OF NOTICE

We consent to the entry of an order granting the motion by Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America, to

advance the above-entitled causes and to consolidate them for joint hearing, and hereby waive notice of said motion.

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